

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 10,851
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying his application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

FINDINGS OF FACT

1. The petitioner is a thirty-eight-year-old man who left high school after the eleventh grade and has had no further training. He applied for Medicaid benefits on June 27, 1991, and was denied on October 21, 1991. A hearing was originally held on April 1, 1992 in this matter but the record was kept open at the request of the parties to have a consultative examination by a psychologist. That consultative report was received by the hearing officer on February 3, 1993, and the petitioner's memo and some additional evidence were received on March 18, 1993 when the record was closed.

2. From 1973 to 1979, the petitioner worked at a family owned grocery store and, in 1979, purchased the store and continued to manage it until he sold it in 1986. From 1986 until 1988, the petitioner worked as a general manager of a food wholesaling business but was laid off due to a management

change. Although the petitioner has attempted to work for very brief periods since that time, his last gainful and substantial employment was in 1988.

3. The petitioner claims to be disabled from at least March of 1991 due to cardiac disease, a herniated disc in his spine, psoriatic sores on his feet, and an anxiety disorder manifested by frequent panic attacks.

4. The evidence shows that the petitioner was hospitalized for chest pain in January of 1990 when it was discovered that the patient had damage to his heart indicating that he had suffered a heart attack. He was diagnosed as having premature coronary arteriosclerosis and was placed on a rehabilitation program. He was initially limited with regard to heavy lifting or strenuous work and was found eligible for Medicaid benefits. By February of 1991, his physician declared that he had done well on the rehabilitation program and was able to engage in any physical activity which he desired. He continues to be treated with medications for his cardiac condition.

5. While his cardiac condition was stabilizing, the petitioner sought help to retrain through the vocational rehabilitation program. A psychological examination performed on him in June of 1990, indicated that he suffered from a panic disorder without any evidence of agoraphobia. He was described as being mildly to moderately anxious, slightly depressed and motivated to work. It was also noted that the

petitioner played golf, drove his own car, did housework and had a long-term stable relationship with a woman. He was being treated at that time with Xanax which seemed to relieve some of his symptoms.

6. Although his cardiac condition had stabilized by February of 1991, the petitioner continued to be anxious about his health and was referred by his cardiologist to a psychiatrist. That psychiatrist diagnosed the petitioner as suffering from panic disorder and depression in March of 1991 of such a level of severity that he felt that he would be unable to work for a six month period while he was undergoing therapy. Nevertheless, the petitioner's Medicaid benefits were cut off, a decision which he did not appeal.

7. The petitioner continued to be treated by the psychiatrist with a tranquilizer, Xanax, and with counseling sessions and the petitioner improved a great deal. He attempted to make sandwiches in his former store for a while but had some difficulty because the medicine made him feel tired. By the time his counseling sessions were complete in August of 1991, the petitioner's psychiatrist felt that his panic attacks were under control and noted that he had an active social life, was engaged, and that he was working part-time in the family store.

8. During that same month however, the petitioner began experiencing low back and left calf pain which he felt was probably due to a previously diagnosed herniated disc. He

went to an orthopaedist who could not see anything on an X-ray but a later MRI performed in September of 1991 showed that the petitioner indeed had a large central disc herniation at the L4-5 vertebrae, a bulging annulus at L3-4 and a degenerative disc space disease at the L4-5 level with dehydration of the L3-4 and L5-S1 intervertebral discs as well. The petitioner was advised to avoid lifting and to restrict aggressive activities. He was prescribed Darvocet to alleviate the pain.

Apparently, no surgery has been suggested to him for treatment of the herniated disc. He does wear an elastic back brace at present.

9. Although the petitioner had improved mentally by August of 1991, he had no money to continue therapy because he still felt unable to work, in spite of several attempts, and had no Medicaid insurance. At the time of his hearing, he had been out of therapy for over eight months. His situation had deteriorated and he was having daily mild panic attacks lasting about thirty to sixty minutes and more severe panic attacks one to two times per week. During the mild attacks he would become irritable, nervous and fearful. He shakes and is unable to concentrate. During the more major attacks, he experiences shortness of breath, chest pains, profuse sweating and intense fear. The physical experience comes on without any impetus, lasts for about two hours and results in a need to sleep due to exhaustion for several hours afterward. One of his doctors has posited that these panic attacks may be of

organic origin, possibly related to his early cardiac disease.

10. The petitioner's and his mother's entirely credible testimony is that his daily life is significantly affected by his frequent panic attacks. He is afraid to drive a car because he might have an attack while driving and only rarely does so. He curtails activity which puts him in public, crowded places. The petitioner in addition to owning his own business, was a champion golfer and engaged to be married to a woman he had known for eight years. He no longer golfs (partly due to his back problems and fear of traveling to tournaments) and broke up with his fiancée. He lives with his mother and spends most of the day watching television or listening to stress reduction tapes, doing little else. He has a new girlfriend who visits him daily but they rarely go out together. The petitioner experiences suicidal thoughts and says that he spends most of his energy just trying to get through the day. He still obsesses about his cardiac condition and believes he is getting progressively worse. He continues to take a veritable arsenal of medication for his various physical and mental problems which are paid for by the Department of Social Welfare.

11. Following the hearing, the petitioner was interviewed by a psychologist in June of 1992 who concluded that the petitioner suffers from panic attacks. Unfortunately, the psychologist did not describe how those attacks might affect his functioning other than to

characterize his lifestyle as isolated and to note that he had a great fear of death and was adverse to travel due to unrealistic fears. On the day that he was interviewed, it was noted that the petitioner exhibited several strengths including good memory, full orientation, and good cognitive, reading and mathematical skills. On that day he was not observed to be depressed or overly anxious. No conclusion was reached by the psychologist who interviewed him as to the severity of his illness or the effect it has on his ability to work.

12. Based on the above, the Department of Disability Determinations (DDS) concluded that the petitioner is limited physically to medium work (lifting no more than 50 pounds maximally and 25 pounds frequently; able to stand or walk for six hours) and is moderately limited with regard to completing a normal workday and workweek without interruptions from psychologically based symptoms and at a consistent pace; moderately limited with regard to his ability to interact appropriately with the general public; and moderately limited with regard to his ability to respond appropriately to changes in the work setting. It was concluded, therefore, that the petitioner could not return to his former occupation as a store owner and manager but could perform other unskilled work. DDS' decision was based in large part on an assessment performed by one of its physicians who analyzed the above reports but who did not personally examine or interview the

petitioner and who concluded that the petitioner was only slightly restricted with regard to his daily living activities, was moderately restricted in his social functioning and often, but not frequently, experienced deficiencies of concentration, persistence of pace resulting in failure to complete tasks in a timely manner (in a work setting or elsewhere). While DDS' decision that the petitioner cannot return to his former work appears to be based on the evidence, the conclusion that the petitioner's functional limitations are not severe or frequent is not supported by the credible evidence.

13. Based on the above it is found that the petitioner has significant physical and mental impairments which prevent him from returning to his former occupation as a store owner and business manager. The evidence specifically shows that the petitioner is limited by spinal abnormalities and pain from strenuous lifting although it is not clear either from the medical reports or the petitioner's testimony exactly what the level of limitation is, i.e., how much the petitioner can lift. It does not appear that the petitioner's cardiac condition currently presents any functional problems for him. Neither is there any medical evidence that the petitioner's psoriasis poses any significant functional limitations for him.

14. There is considerable evidence, however, that the petitioner suffers from a mental impairment which does

significantly affect his ability to function. The evidence which consists both of a medical diagnosis (by at least four physicians or psychologists) of panic disorder and the petitioner's and his mother's own credible evidence clearly shows that the petitioner suffers from severe panic attacks which occur once or twice per week and which are marked by the unpredictable onset of intense apprehension, fear, terror and sense of impending doom. These panic attacks have severely restricted the petitioner's ability to function in a social sense, that is to go outside the house and socialize, work, shop, etc. and to carry on his former activities, such as golfing and managerial work activities. The petitioner is also clearly unable while he is having panic attacks to concentrate or complete tasks and has repeatedly been forced to withdraw from work settings due to his fears and anxiety.

15. The Department put forth no vocational evidence which would tend to show that jobs exist in significant numbers in the national economy for a person who has the combination of impairments possessed by the petitioner.

ORDER

The Department's decision is reversed.

REASONS

Medicaid Manual Section M 211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments,

which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

The petitioner has, as the Department admits, met his burden of proving that he has severe medical limitations which prevent him from performing his previous work. As such, the burden shifts to the Department to show that there is other work which exists in the national economy which the petitioner can do given his combination of impairments. 20 C.F.R. § 416.960(b)(3). Fair Hearing No. 9205. The Department failed to put forth any evidence on this issue. The Department clearly cannot rely on the Medical Vocational Guidelines at 20 C.F.R. § 404, Subpart P, Appendix II, because they are not applicable where mental impairments are present. See Rule 200.00 (e), id.

In addition, it is quite possible that the petitioner in fact is disabled under the listings of impairments for mental disorders based on his panic attacks.¹ However, that need not

¹12.06 Anxiety Related Disorders:

In these disorders anxiety is either the predominant disturbance or it is experienced if the individual attempts to master symptoms; for example, confronting the dreaded object or situation in a phobic disorder or resisting the obsessions or compulsions in obsessive compulsive disorders.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in both A and C are satisfied.

A. Medically documented findings of at least one of the following:

1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms:

- a. Motor tension; or
- b. Automatic Hyperactivity; or
- c. Apprehensive expectation; or
- d. Vigilance and scanning;

or

2. A persistent irrational fear of a specific object, activity, or situation which result in a compelling desire to avoid the dreaded object, activity, or situation; or

3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week; or

4. Recurrent obsessions or compulsions which are a source of marked distress; or

5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress;

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from the situation or to experience

be determined in this matter since the burden was not on the petitioner to show that he had a condition which meets the listings. It should be noted, however, that it might have been easier to make a determination on medical factors alone (equivalence to the listings) if the Department had asked the consulting psychologist whom it paid to evaluate the petitioner in June of 1992 to also evaluate his functional limitations, rather than asking a third medical expert who had not seen the petitioner to make that evaluation. Obviously that last evaluation because of the defect of non-contact with the petitioner has little probative value.

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exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors);

C. Resulting in complete inability to function independently outside the area of one's home.